2-401

FILE COPY

FILE

SEP 8

MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-401

CITIZENS UTILITIES WATER COMPANY OF ARIZONA, an *ARIZONA CORPORATION*,

Petitioner,

v.

THE SUPERIOR COURT OF THE STATE OF ARIZONA, IN AND FOR THE COUNTY OF PIMA; THE HONORABLE JACK G. MARKS, a JUDGE THEREOF; and the CITY OF TUCSON, a municipal corporation,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

Earl H. Carroll
363 North First Avenue
Phoenix, Arizona 85003
Counsel for Petitioner

Of Counsel:

Lex J. Smith
EVANS, KITCHEL & JENCKES, P.C.
363 North First Avenue
Phoenix, Arizona 85003

THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED	2
QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	7
1. This Case Presents an Important Question as To The Constitutional Limits of a Municipality's Extraterritorial Exercise of Its Delegated Power of Eminent Domain	7
a. Absence of public use – character and location of properties	7
b. Absence of public use – excessive taking	13
2. The Supreme Court of Arizona Authorized The City's Acquisition of Petitioner's Properties in Such a Way That Petitioner Was Deprived of The Right To Be Heard on The Reasons Alleged To Support The City's Action	14
CONCLUSION	17
APPENDIX	A. 1
1. Opinion of the Supreme Court of Arizona	A. 1

Page

2. Order Affirming Judgment . . . . . A. 12

3. Order Denying Rehearing . . . . . A. 13

4. Memorandum Opinion and Order dated February 28, 1969 . . . . . A. 14

5. Memorandum Opinion and Order dated November 29, 1971 . . . . . A. 26

6. A.R.S. §9-511 (1956) . . . . . A. 31

7. *Ariz. Const.* Art. II, §17 . . . . . A. 32

8. Trial Transcript pages 162-66 . . . . . A. 33

CITATIONS

Cases:

Bloodgood v. Mohawk & H. River R. Co., 18 N.Y. (Wend.) 9, 31 Am. Dec. 313 12

Burger v. City of Beatrice, 181 Neb. 213, 147 N.W.2d 784, 789 (1967) 12

Chicago B. & Q. Ry. v. Chicago, 166 U.S. 236 (1897) 9

Citizens Utilities Water Company of Arizona v. Superior Court, 497 P.2d 55 (Ariz. 1972) 1

City of Cincinnati v. Vester, 33 F.2d 242 (6th Cir. 1929) 11, 14

City of Phoenix v. Kasun, 54 Ariz. 470, 97 P.2d 210, 212 (1939) 10, 11

City of Richmond v. Carneal, 129 Va. 388, 106 S.E. 403 (1921) 12

Page

Colbert v. City of Tupelo,
187 So.2d 310 (Miss. 1966) 12

Courtesy Sandwich Shop v. New York Port Authority,
12 N.Y.2d 379, 390-391,
190 N.E.2d 402, 411 (1963)
(dissenting opinion) 13

Fallbrook Irrigation District v. Bradley,
164 U.S. 403 (1896) 11

Goldberg v. Kelly,
397 U.S. 254, 269-70 (1970) 17

Hansen v. City of Havre,
114 P.2d 1053 (Mont. 1941) 12

Kollar v. City of Tucson,
319 F. Supp. 482 (D.Ariz. 1970),
appeal dismissed, 402 U.S. 967 (1971) 11

Lough v. Town of Mulhall,
414 P.2d 254 (Okla. 1966) 12

Madisonville Traction Co. v. Saint Bernard Mining Co.,
196 U.S. 239 (1905) 11

Missouri Pac. Ry. v. Nebraska,
164 U.S. 403 (1896) 8, 9

Ohio Water Service Co. v. City of Circleville,
81 N.E.2d 304 (Ohio App. 1947) 12

Opinion of the Justices,
204 Mass. 607, 91 N.E. 405 (1910) 14

Oury v. Goodwin,
3 Ariz. 255, 26 P. 376 (1891) 9

Saunders v. Shaw,
244 U.S. 317 (1917) 15, 16, 17

Score v. Griffin,
9 Ariz. 347, 348-49,
83 P. 350 (1905) 15

Page

Other:

U. S. Const. amend. XIV, §1 2

Ariz. Const. art. II, §17 . . . . . 5, 7

Ariz. Rev. Stat. Ann. §9-511 (1956) 2, 7

Nicholas' The Law of Eminent Domain (3d rev. ed. 1964) 8

Annotation, 14 A.L.R. 1350 14

Annotation, 68 A.L.R. 837 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No.

CITIZENS UTILITIES WATER COMPANY OF ARIZONA, an *ARIZONA CORPORATION*,

Petitioner,

v.

THE SUPERIOR COURT OF THE STATE OF ARIZONA, IN AND FOR THE COUNTY OF PIMA; THE HONORABLE JACK G. MARKS, a JUDGE THEREOF; and the CITY OF TUCSON, a municipal corporation,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of Arizona entered in this proceeding on May 12, 1972.

OPINIONS BELOW

The opinion and judgment of the Arizona Supreme Court is reported at 497 P.2d 55 and is found in the Appendix at A. 1. The unpublished Memorandum Opinions and Orders

of the trial court are found at A. 14 (dated February 28, 1969) and A. 26 (dated November 29, 1971).

JURISDICTION

The Judgment of the Supreme Court of Arizona was entered on May 12, 1972. A timely petition for rehearing was denied on June 13, 1972, (A. 13) and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part " . . . nor shall any State deprive any person of life, liberty, or property without due process of law . . . ."

Ariz. Rev. Stat. Ann. §9-511 (1956) and Art. II, §17 of the Arizona Constitution are reprinted at A. 31 and A. 32 respectively.

QUESTIONS PRESENTED

1. Where a municipality seeks to acquire by eminent domain the properties of a private water utility, is the due process clause of the Fourteenth Amendment violated by a taking for a non-public use where the municipal acquisition includes all of the utility's properties within the county including outside city properties which are not integrated or interconnected with each other or with inside city facilities and which are not used or necessary to serve the city or its inhabitants?

2. Is the due process clause of the Fourteenth Amendment violated where a State Supreme Court authorizes a municipality's acquisition of private water utility properties in such a way that the condemnee has not been afforded a proper opportunity to present evidence on the reasons alleged to support the acquisition?

STATEMENT OF THE CASE

This proceeding presents a challenge to the asserted right of the City of Tucson, Arizona, a municipal corporation (hereafter "City") to acquire by eminent domain certain of petitioner's properties used in providing private utility water service to domestic and commercial users in Pima County, Arizona.

Petitioner Citizens Utilities Water Company of Arizona is a public service corporation which owns and operates certain properties and facilities used in the distribution of water for domestic and commercial purposes in Pima County, Arizona. The company holds certificates of convenience and necessity from the Arizona Corporation Commission which permit it to serve certain areas in Pima County totalling 65,000 acres of which approximately 50,000 acres are outside of the corporate limits of the City of Tucson. Petitioner's water service areas are not all contiguous and its water service facilities are not interconnected to form a single water distribution system. The company owns properties including certificates of convenience and necessity in various areas: some properties are located within the Tucson city limits; others are situated outside of the City boundaries and are connected to facilities within the City. As to these properties, petitioner does not dispute the propriety of the

City's exercise of its eminent domain power. However, certain of petitioner's properties are located wholly outside of the City's boundaries, are used exclusively to serve nonresidents of the City and are not used or necessary to provide water service to the City or its inhabitants. The City's attempted exercise of the eminent domain power over these properties provides the basis for this petition. The taking of such properties constitutes an abuse of the eminent domain power and deprives petitioner of its property without due process of law within the meaning of the Fourteenth Amendment to the United States Constitution.

The condemnation proceeding was instituted by the City of Tucson on or about December 6, 1968 in the Pima County Superior Court as Cause No. 110899 to acquire certain, but not all, of petitioner's properties within Pima County. After extensive proceedings, the issues were joined on or about August 6, 1970 at which time petitioner filed its Answer to the City's Second Amended Complaint. The Second Amended Complaint seeks to acquire *all* of petitioner's waterworks plants, distribution facilities and properties (without regard to their location or usefulness in serving the City or its inhabitants) including all certificates of convenience and necessity within Pima County, Arizona. Petitioner's Answer denied, *inter alia*, that the proposed acquisition of properties located wholly outside the City and used exclusively to serve nonresidents was authorized and further denied that the property sought to be acquired by eminent domain was to be taken for a public use. Inherent in such denial was the allegation that any sanctioned taking of such properties would deprive petitioner of due process of law under the Fourteenth Amendment.

The parties stipulated that the trial of the proceeding would be bifurcated and that Phase I of the trial would be to the court on the issue of the City's right to condemn those properties which were located outside of the City's boundaries, were not interconnected with each other or with distribution facilities located within the City's boundaries and which were not used or necessary to serve the City or its inhabitants. On November 29, 1971 the trial court entered a Memorandum Opinion and Order (Appendix, A. 26), which held that the City was authorized to acquire by eminent domain all of petitioner's properties regardless of their location or their ability to provide water service to the City or its inhabitants.

In the trial court's order of November 29, 1971, the court stated: "the defendant contends that to permit the condemnation of its waterworks properties . . . is in violation of the due process clause of the 14th amendment to the United States Constitution . . . ." The trial court sanctioned the proposed taking and therefore by necessity denied petitioner's constitutional objection.

Petitioner then filed a statutory special action proceeding in the nature of an extraordinary writ with the Supreme Court of Arizona seeking review of the trial court's order of November 29, 1971. The action was brought in order to determine prior to a trial on the issue of damages, whether the taking at issue was in fact authorized so that costly and extensive litigation could be avoided if the trial court had erred in authorizing the acquisition in the first instance. At page two of the Petition for Special Action, petitioner alleged that "the attempted exercise is further unauthorized as such taking is not for a 'public use' and consequently is in violation of Article II, Section 17 of the Arizona Constitution and the

Fourteenth Amendment of the United States Constitution." The constitutional issues were considered in various briefs filed in support of the special action proceeding. The Supreme Court of Arizona found no state or federal constitutional objection and affirmed the trial court's order remanding for a determination of damages.

In the course of the trial on November 23 and 24, 1971, on the propriety of the City's proposed acquisition, the City presented certain testimony of the Tucson City Manager in an offer of proof. The testimony offered asserted various reasons to support the desirability of condemning all of petitioner's properties regardless of location. Upon timely objection, the trial court excluded the offer of proof on several evidentiary grounds. Reported Transcript of Proceedings, November 23 and 24, 1971 at pages 165-66 (A. 33). Because the proferred testimony was excluded, petitioner found no need to introduce testimony to rebut the matters covered by the rejected offer of proof. The Supreme Court of Arizona was not requested to review any of the trial court's evidentiary rulings and the exclusion of the offer of proof was in no way challenged by the City. Notwithstanding this fact, the Supreme Court of Arizona not only considered the excluded testimony of the Tucson City Manager, but emphasized the matters covered in such testimony as providing "the bases for very powerful arguments for permitting all of the properties to be condemned." 497 P.2d at 58. Petitioner was not afforded an opportunity to present contradictory evidence on the matters which were deemed persuasive and in fact dispositive of the issue of the City's right to acquire the proposed properties and therefore challenged the Supreme Court's decision in its motion for rehearing as effectively depriving petitioner of its day in

court. Without the opportunity to challenge the factual bases of the "powerful arguments," petitioner has been denied procedural due process under the Fourteenth Amendment to the United States Constitution. The Supreme Court of Arizona summarily denied petitioner's motion for rehearing below on June 13, 1972 whereupon this petition for a writ of certiorari was filed.

REASONS FOR GRANTING THE WRIT

1. This Case Presents An Important Question As To The Constitutional Limits Of A Municipality's Extraterritorial Exercise Of Its Delegated Eminent Domain Power.

a. Absence of public use – character and location of properties

As more accurately appears in Exhibit G attached to the Petition for Special Action (a map showing areas relevant hereto), some of the properties sought to be acquired by the City in its condemnation action are located wholly outside the corporate boundaries of the City. However, the mere fact that these properties are located outside of the City limits does not render the taking unauthorized since municipal corporations may exercise the right of eminent domain "within or without" their corporate limits. *Ariz. Rev. Stat. Ann.* §9-511 (1956). The use for which the property is to be taken, however, must in all cases be "public," *Ariz. Const.*, Art. II, §17, and it is this aspect of the City's proposed acquisition that is material in this proceeding. It is well established that a taking of private property for a use that is not public

> "is such a violation of the basic and essential features of constitutional government that it amounts to a taking without due process of law." 1 Nichols' The Law Of Eminent Domain, §4.7 at 449 (3d rev. ed. 1964).

The due process limitations of the City of Tucson's proposed extraterritorial condemnation were before the Supreme Court of Arizona. Conceding the statutory authorization to acquire water facilities outside of the city limits, how far within due process could the municipality reach to improve its waterworks system? What kinds of properties could be constitutionally included in a proposed taking? What must be the relationship between the municipality and the properties sought to be condemned? The Supreme Court of Arizona has below held that it is within the permissible limits of the due process clause of the Fourteenth Amendment for a municipality to acquire private waterworks facilities which are (1) located as far as twenty miles from the City's boundaries; (2) isolated, not interconnected with facilities which could be connected to city facilities or distribution lines and therefore not providing an integrated system; and (3) not used or necessary to provide water service to the City or its inhabitants. It is respectfully submitted that without some demonstrable benefits inuring to the advantage of the inhabitants of the City, such a sanctioned acquisition exceeds the limits of due process.

The due process limitations of a municipality's extraterritorial exercise of the eminent domain power have not been discussed by decisions of this court. However, the Court has held that due process is denied where a taking is for a use which is not public, *Missouri Pac. Ry. v. Nebraska*, 164 U.S. 403 (1896), and it should require little

argument to establish that the due process clause circumscribes all exercises of eminent domain to provide a limit beyond which the condemning agency may not go. Thus, a state's exercise of its power of eminent domain must meet the requirements of the due process clause of the Fourteenth Amendment, and whether or not the state has met those requirements is a proper federal question. *Chicago B. & Q. Ry. v. Chicago*, 166 U.S. 236 (1897); *Missouri Pac. Ry. v. Nebraska*, 164 U.S. 403 (1896). Therefore, in all exercises of eminent domain, unless there is a demonstrable public use involved in the properties sought to be acquired, the condemnee has been deprived of due process of law under the Fourteenth Amendment.

The Supreme Court of Arizona views challenges to a proposed acquisition by eminent domain on a case by case basis but looks at the public use concept in terms of "public convenience and advantage." 497 P.2d at 58 quoting *Oury v. Goodwin*, 3 Ariz. 255, 26 P. 376 (1891). However, no admissible convenience or advantage was asserted by the City to support the proposed acquisition. Petitioner is now forced to ask this Court what public benefit, convenience or advantage for either residents or nonresidents of the City of Tucson can justify the taking of the properties here at issue? Such properties were defined by evidence adduced at the trial: more than 50% of petitioner's service attachments and approximately 75% of petitioner's certificated areas are located outside of the City limits. Twenty-six of petitioner's thirty "service areas" are located outside of the City limits and are not connected with any water distribution facilities located inside the City limits so as to provide service to the inhabitants of the City. Further there was evidence which inferentially disclosed that traditional growth patterns of the City,

even if continued in the indeterminate future, would not necessarily include many of petitioner's properties located to the north and west of the City. Moreover, no evidence was adduced by the City to indicate that the City had any intention of establishing an integrated waterworks system with the acquired properties to provide service to the City and its inhabitants. Instead, petitioner's evidence disclosed in uncontradicted fashion that the bulk of its properties were not connected with service lines within the City. City residents could therefore not receive any water service from the outside City sources and properties sought to be condemned.

Assuming the equation of the public use doctrine with notions of public benefit and advantage, the City has not demonstrated that any tangible or intangible benefits inure to either residents or nonresidents of the City. As far as City residents are concerned, one must speculate as to what benefits are derived by inhabitants of a municipality by acquiring properties which cannot be used to provide water service within the City. No benefits can be seen for residents since the properties are not used or intended to be used or integrated into a City system thereby precluding inhabitants from receiving water service from the properties sought to be acquired.

Likewise, petitioner submits that nonresidents can find only illusory advantages to be derived from the taking. For example, under applicable Arizona law, nonresidents are forced to forego their right to receive *any water service at all* should there be a water shortage since a municipally operated water system must accord a prior right to use available water to inhabitants of the City. See *City of Phoenix v. Kasun*, 54 Ariz. 470, 474, 97 P.2d 210, 212 (1939). Moreover, they would relinquish their right

to receive any supervision by the Arizona Corporation Commission regarding City service, since while the City furnishes water in its private discretionary capacity, the state corporation commission has no jurisdiction to regulate its action toward consumers. *City of Phoenix v. Kasun, supra.* Nonresidents served by the City, then, are without an independent forum for determining reasonableness of rates or adequacy of service. Further, the electoral process provides no answer to the nonresidents' dilemma since all nonresident users as a matter of law are deprived of the right to vote on whether the incumbent municipal administration is adequately serving their needs. See *Kollar v. City of Tucson,* 319 F. Supp. 482 (D. Ariz. 1970), *appeal dismissed,* 402 U.S. 967 (1971). In the face of these obvious deficiencies, the Supreme Court of Arizona has determined that a public use will be promoted by the taking here at issue even though the "benefits," "convenience" or "advantages" inuring to residents and nonresidents alike are nonexistent.

This Court has held that a state's exercise of its powers of eminent domain is subject, under the due process clause of the Fourteenth Amendment, to the same nominal requirement that the states have set down for themselves, that is, that the taking be for a "public use." Without a public use, the condemnation violates the due process clause of the Fourteenth Amendment. *Madisonville Traction Co. v. Saint Bernard Mining Co.,* 196 U.S. 239 (1905); *Fallbrook Irrigation District v. Bradley,* 164 U.S. 403 (1896); *City of Cincinnati v. Vester,* 33 F.3d 242 (6th Cir. 1929). It is submitted that no such use of a public character exists in the proposed acquisition by the City of outlying properties which are not interconnected with each other or with facilities which could provide service

to City residents. Conceding that outside City properties may be lawfully acquired by the City, a public use can only exist when such properties offer benefits to City inhabitants. See, *e.g.*, the benefits derived by *City residents* in the following cases involving extra-territorial takings by a municipality. *Ohio Water Service Co. v. City of Circleville*, 81 N.E.2d 304 (Ohio App. 1947); *Colbert v. City of Tupelo*, 187 So.2d 310 (Miss. 1966); *Lough v. Town of Mulhall*, 414 P.2d 254 (Okla. 1966); *Hansen v. City of Havre*, 114 P.2d 1053, 1058 (Mont. 1941). *Burger v. City of Beatrice*, 181 Neb. 213, 147 N.W.2d 784, 789 (1967) (the city had the right of eminent domain both within and without its limits "for purposes of providing an adequate water supply to provide the needs of the city and its inhabitants."). No such benefits have been discerned for inhabitants of the City of Tucson. Likewise, the acquisition effectively forces nonresidents to forego substantial existing benefits under Arizona law. The proposed acquisition by the City of Tucson of the properties here at issue is therefore not for a public use and hence is in violation of the due process clause of the Fourteenth Amendment to the United States Constitution.

This court has precisely ruled that there are federal constitutional limits to exercises of eminent domain. Without such limitations, and in light of the Supreme Court of Arizona's equation of the term "public use" with simple notions of possession and occupation by a municipality, "is there any limitation which can be set to the exertion of legislative will in the appropriation of private property?" *Bloodgood v. Mohawk & H. River R. Co.*, 18 N.Y. (Wend.) 9, 31 Am. Dec. 313, 356 quoted in *City of Richmond v. Carneal*, 129 Va. 388, 106 S.E. 403.

> "To hold a purpose to be public merely for the reason that it is invoked by a public body to

> serve its ideas of the public good . . . can only be done on the assumption that we have passed the point of no return, that the trade, commerce and manufacture of our principal cities can be conducted by private enterprise only on a diminishing scale and that private capital should progressively be displaced by public capital which should increasingly take over . . . ." *Courtesy Sandwich Shop v. New York Port Authority*, 12 N.Y.2d 379, 390-391, 190 N.E. 2d 402, 411 (1963) (dissenting opinion of Judge Van Voorhis).

Petitioner respectfully submits that we have not "passed the point of no return," and the City's ambitious undertaking deprives petitioner of due process of law under the Fourteenth Amendment.

b. Absence of public use – excessive taking

The trial court acknowledged that some of the properties sought to be acquired were not necessary to provide service to the City or its inhabitants. Page 4 of Memorandum Opinion and Order dated February 28, 1969, at A. 14. The Supreme Court of Arizona in framing the controversy characterized the properties at issue as "not used to serve Tucson citizens." 497 P.2d at 56. The City proffered no evidence to indicate that it intended to integrate the properties into a waterworks "system." Petitioner submits that without some nexus or relationship between the properties sought to be acquired and the ability of the City to serve its inhabitants, the Supreme Court of Arizona has sanctioned the taking of property in excess of what is actually needed for the public use. The City maintains and the state supreme court has apparently held that such properties are "actually needed" even though they are

located many miles from the City's boundaries, are not connected to service lines within the City and are not capable of being used to serve the City's inhabitants.

Petitioner submits that a consideration of the character of the properties here at issue establishes that the City's proposed acquisition exceeds that which is "actually needed" for the public use. Such excessive condemnation as authorized by the Supreme Court of Arizona constitutes an abuse of the eminent domain power and a taking for a non-public use. As such, it violates the due process clause of the Fourteenth Amendment. *Cincinnati v. Vester,* 33 F.2d 242 (6th Cir. 1929); *Opinion of the Justices,* 204 Mass. 607, 91 N.E. 405 (1910). Cf. Annotations, 14 A.L.R. 1350, 68 A.L.R. 837.

2. The Supreme Court Of Arizona Authorized The City's Acquisition Of Petitioner's Properties In Such A Way That Petitioner Was Deprived Of The Right To Be Heard On The Reasons Alleged To Support The City's Action.

During the trial on November 23-24, 1971, the City presented *in an offer of proof* certain testimony of the Tucson City Manager relating to the desirability, from the City's standpoint, of acquiring *all* of petitioner's properties in Pima County. Upon timely objection by petitioner, the trial court excluded the offer of proof on several evidentiary grounds. The pertinent portion of the trial transcript appears at A. 36. Because the testimony was excluded, petitioner naturally found it unnecessary to present rebuttal evidence. No challenge to the exclusion of the offer of proof was made by the City before the Supreme Court of Arizona. In fact, the court acknowledged and presumably

approved the rejection. 497 P.2d at 58. However, while apparently noting the propriety of the rejection of the offer of proof, the court simultaneously emphasized that the excluded testimony provided "the bases for very powerful arguments for permitting all of the properties to be condemned." 497 P.2d at 58. By virtue of the court's surprising emphasis on matters properly excluded by the trial court, petitioner was denied the right to contradict the reasons asserted by the City Manager in support of the acquisition, and consequently was denied due process of law.

The fundamental nature of this denial is evident by a review of the testimony included in the rejected offer. For example, petitioner was denied the right to show the trial court that the "fire protection" in any particular area was already sufficient or that the properties sought to be acquired could not and were not intended to result in an "integrated water system throughout the area." Petitioner was denied the right to question the City Manager's "metropolitan concept" of the supply and control of water and was denied the right to introduce rebutting testimony as to "supply and demand" trends in "different areas." Most importantly, no opportunity was afforded petitioner to fully demonstrate what "the natural future growth of the city" will be in terms of water service demands.

The fact that such testimony alone was even considered by the Supreme Court of Arizona was a violation of established substantive Arizona law. *Score v. Griffin*, 9 Ariz. 347, 348-49, 83 P. 350 (1905) (opinion on rehearing). But the fact that the decision of the Supreme Court authorizing the acquisition treated the excluded testimony as persuasive, if not dispositive of the issues before it, is a clear denial of due process of law under the Fourteenth Amendment. This Court has so held. *Saunders v. Shaw*, 244 U.S. 317 (1917).

Saunders involved a suit for an injunction against the collection of a drainage tax. At trial, plaintiff offered certain evidence to show that the land taxed was outside of the levee system being built by the drainage commissioners so that it would receive no benefit from the drainage district. Defendant objected and such evidence was excluded as inadmissible under the pleadings. The holder of some drainage district bonds was allowed to intervene in defense of the injunction. Judgment was ultimately entered for the defendant and intervener.

The court, however, granted a rehearing and reversed the judgment placing emphasis on testimony which had been excluded in the first instance. The testimony was not rebutted by the intervener since it had been excluded by the court and there was no need to contradict it.

The United States Supreme Court held that the intervener had been denied due process of law under the Fourteenth Amendment. The Court, through Mr. Justice Holmes, observed that the intervener

> "was not bound to go on and offer evidence that he contended was inadmissible, in order to rebut the testimony already ruled to be inadmissible in accordance with his view.
>
> * * *
>
> Probably the majority of the supreme court thought that it was so plain on the uncontroverted facts that the case was within the principle of the Meyers Salt Co. Case that to remand it would be an empty form, – a mere concession to technicality. It may turn out to be so, but we do not see in the record an absolute warrant for the assumption,

> and therefore cannot be sure that the defendant's rights are protected without giving him a chance to put his evidence in." 244 U.S. at 319.

The similarity between *Saunders* and the instant proceeding is striking and petitioner submits conclusive to establish that the ruling of the Supreme Court of Arizona effectively deprived petitioner of due process of law and the right to a fair hearing under the Fourteenth Amendment. Like the intervener in *Saunders*, petitioner felt it unnecessary to proffer rebuttal testimony since the City's offer of proof was properly deemed inadmissible by the trial court. However, by incorporating the excluded offer in the Court's opinion and treating it as persuasive if not dispositve of the issue of the propriety of the City's ambitious acquisition plan, the Supreme Court of Arizona has effectively denied petitioner the right to an evidentiary hearing – a right so fundamental in our constitutional system. Cf. *Goldberg v. Kelly*, 397 U.S. 254, 269-70 (1970).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Arizona.

Respectfully submitted,

Earl H. Carroll
Evans, Kitchel & Jenckes, P.C.
363 North First Avenue
Phoenix, Arizona 85003

Counsel for Petitioner

Of Counsel:

Lex J. Smith
Evans, Kitchel & Jenckes, P.C.
363 North First Avenue
Phoenix, Arizona 85003

APPENDIX

IN THE SUPREME COURT
OF THE STATE OF ARIZONA
In Banc

CITIZENS UTILITIES WATER COMPANY OF ARIZONA, an Arizona corporation, *Petitioner,*	)	
vs.	)	NO. 10726
THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF PIMA; THE HONORABLE JACK G. MARKS, A JUDGE THEREOF; and the CITY OF TUCSON, a municipal corporation, *Respondents.*	)	

[Filed May 12, 1972]

SPECIAL ACTION

Judgment Affirmed and Case Remanded
for Further Proceedings

Evans, Kitchel & Jenckes
By Lex J. Smith and Earl Carroll — Phoenix
Attorneys for Petitioner

Herbert E. Williams, City Attorney
By Richard H. Day, Assistant City Attorney — Tucson

Chandler, Tullar, Udall & Richmond
By Thomas Chandler — Tucson

Rose Silver, Pima County Attorney — Tucson
Attorneys for Respondents

HAYS, Chief Justice

Petitioner in this court, Citizens Utilities Water Company, hereinafter referred to as "Citizens" or "the company," was the defendant below, in an action by the City of Tucson to condemn all of the company's properties in Pima County. Respondent, City of Tucson, was the plaintiff below and is the real party in interest in this court.

The complaint alleged that an election was held, in which the citizens of Tucson approved condemnation of additional water facilities, and that pursuant thereto the city council passed a resolution authorizing and directing the condemnation of all of Citizens' property in Pima County "used and useful in rendering water utility service." The city's complaint prayed for a decree of condemnation of all of Citizens' property in the county, including its certificates of convenience and necessity.

The record shows that the company's certificates of convenience and necessity permit it to serve a number of noncontiguous areas totalling 640,000 [sic] acres in Pima County, with varying population densities. Some of the areas are several miles from the city limits; some of them are inside. Some are outside the limits but serve residents of the city; others are outside but are connected to facilities that serve city residents; still others are outside the city limits, unconnected to any city facilities and do not serve any city residents. Many of the certificated areas are partially or wholly undeveloped. The company admits the city's right to condemn those properties which are located inside the city, are connected to city facilities, or serve city residents. This controversy is over the question of the city's right to condemn those properties which are outside the city, unconnected with the city, and not used to serve Tucson citizens.

The parties agreed that the trial would be bifurcated, and that the first part would take place before the court

sitting without a jury. It would try only the issue of the city's right to condemn those properties which lay outside the city limits, were not connected to the city's water system, and did not serve any resident of the city. The second part would be tried to a jury on the sole issue of damages arising from the taking.

The trial court held that the city could take *all* of the company's properties. The company, by this special action, sought and obtained a stay from this court and a review of the trial court's holding.

In examining the Arizona Constitution one finds that the exercise of the right of eminent domain is circumscribed by Article 2, Section 17, which reads as follows:

> "Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public."

Absent a violation of the United States Constitution, the above paragraph is the *only* limitation on the power of the State of Arizona to condemn private property.

Municipal corporations, on the other hand, are creatures of the State and have only such powers as the State sees fit to delegate to them, plus any which are granted to them by the State Constitution. Arizona Constitution, Article 2, Section 34, grants to the State, and to all municipal corporations in the State, the right to engage in "industrial pursuits." Arizona Constitution, Article 13, Section 5, provides that every municipal corporation in the State may engage in any business or enterprise which

it can franchise private individuals or corporations to engage in.

The power of eminent domain has been granted by the State to the City of Tucson by means of several statutes and by means of the City's charter. A.R.S. §9-511 grants cities the power to exercise the right of eminent domain *within or without the city limits* to acquire and build water works, pipe lines, and sites therefor. Section 9-516 authorizes cities to exercise the right of emiment domain to acquire the facilities of any public service corporation, and requires that the city refrain from servicing the same area until it has acquired the utility. Section 12-1111 permits cities to exercise the right of eminent domain to obtain buildings, pipe lines, canals, and reservoirs.

Section 12-1112 provides that before property may be taken, it must appear that the taking is necessary and, if the property is already appropriated to some public use, that the public use to which it is to be applied is a "more necessary" public use.

Article IV, Section 1, of the Tucson City Charter, adopted by a vote of its residents, and approved by the governor of the State of Arizona, contains the following provisions:

> "The city shall have the power . . .
>
> "To acquire . . . by condemnation . . . works and appliances within and without the city for supplying the city and its inhabitants, also persons, firms, and corporations, with water. . . .
>
> "To sell within or without the city, water . . . .

> "To exercise the right of eminent domain for the purpose of acquiring real and personal property of every kind, including water, water rights, and waterworks, within and without the corporate limits, necessary or convenient for the use of the city or its inhabitants."

Despite this imposing array of authority to condemn property outside the city's limits, the company contends that the condemnation violates the constitutional mandate that the contemplated use be public, and violates the statutory mandate that the taking be necessary.

The company argues somewhat as follows: A city cannot be compelled to supply water to persons living outside of its corporate limits, but may supply such persons if it desires to do so. If it does, it may do so only with surplus water. and as soon as water has to be limited, it may cut off service to nonresidents. Since nonresidents are not entitled to water as a matter of right, the city's action in supplying water to them is not a public use, but is rather a private use. In Citizens' own language:

> "If members of the public (namely all non-city residents) do not as a matter of right have the ability to enjoy or use the property which is condemned, how can it be said that the taking of petitioner's properties is for a public use?"

As authority for this position, Citizens cite *City of Phoenix v. Kasun*, 54 Ariz. 470, 97 P.2d 210. All that case actually holds is that when a city furnishes water to nonresidents, the Arizona State Corporation Commission cannot regulate the rates charged.

In *Kasun, supra,* we said that a city which furnished water to nonresidents is acting in a private capacity rather than in its governmental capacity; that such recipients of water had no positive right to demand it and could be cut off from water if the supply became short for the city's residents. *But merely because the city is acting in its private capacity does not mean that the water is not being used for a public purpose.*

We can conceive of many situations in which a city condemns property outside the city limits: for an airport, a sanitary landfill, etc. Certainly *all* of the people are not as a matter of right entitled to demand permission to use the condemned premises. *The untrammeled right to use the property to be condemned, then, is clearly not the criterion of whether the use to be made is a public one.*

Nichols on Eminent Domain contains the following on "public use":

> "Judicial opinion which follows [the] broad concept considers that the narrow doctrine has been repudiated and is no longer the prevailing view. 'Public use' is considered 'public benefit' and it is not considered essential that the entire community or even any considerable portion thereof should directly enjoy or participate in any improvement in order that it constitute a public use." Vol. 2A, p. 7-30.

While we might not go so far as some of the jurisdictions embracing the broad view, we believe that we repudiated the narrow view as early as 1891 in *Oury v. Goodwin,* 3 Ariz. 255, 26 P.376, in which we stated that the determination of what a public use was, would

be determined on a case-by-case method. In that case we said:

> "In a great number of these instances there is no participation by the general public, and the public use consists in the purely incidental benefits." p. 272.

Citizens cite *Inspiration Consolidated Copper Company v. New Keystone Copper Company*, 16 Ariz. 257, 114 P. 277, as an indication that Arizona follows the narrow view. However, that case merely illustrates what we said in *Oury, supra* – namely, that each case will be considered on its own facts. *Oury* has been cited with approval by us as late as 1965 in *City of Phoenix v. Civic Auditorium and Convention Center*, 99 Ariz. 270, 408 P.2d 818, in which we quoted the following from *Oury, supra:*

> "'Public necessity' often means . . . public convenience and advantage."

In *City of Phoenix, supra*, we quoted with approval the following:

> "It is not a valid objection to the exercise of such powers, that one class of the inhabitants would receive more benfit than another. The test is whether the power, if exercised, will promote the general objects and purposes of the municipality . . . ."

In *City of Tucson v. Sims*, 39 Ariz. 168, 4 P.2d 673, we said:

> "Both provisions confer upon cities the right to do a specific thing but do not in terms or by necessary implication limit or prohibit

> them from doing something advantageous to themselves that is merely incidental to the thing specially authorized. Nothing short of an express prohibitation or clear implication to that effect could have this result."

For all of the reasons expressed above, the cases cited by Citizens from other jurisdictions, though pertinent and opposed to our view, need not be cited here.

We hold that the action by the City of Tucson to condemn the property of Citizens is a taking for public use, as that term is used in the Arizona Constitution.

Citizens, however, contends that even if this is true, the taking of the properties outside the city that do not serve Tucson citizens, is not "necessary" as required by the statutes and charter. The city takes the position that the determination of necessity is a legislative decision of the city council which may not be reviewed by the courts, absent fraud or arbitrariness.

Since we have ample Arizona cases to determine this issue, there is no need to discuss the cases in other jurisdictions cited by Citizens. The issue was decided in *Mosher v. City of Phoenix*, 39 Ariz. 470, 7 P.2d 622, where we held:

> "Evidence [was objected to] upon the question of whether or not the amount of land proposed to be taken was necessary for the widening of the street. The court, in our opinion, properly held that this was concluded by the legislative body of the city declaring the necessity." P. 482.

We find an absence of arbitrariness on the part of the city here.

As the trial, the Tucson City Manager testified as to the desirability of condemning *all* of Citizens' properties. His reasons appear in the transcript as an offer of proof, because the trial court refused to admit them. The reasons are material and, even though not admitted in evidence, they are the bases of very powerful arguments for permitting all of the properties to be condemned. For that reason, we list some of them here:

It is desirable that the city have a "metropolitan concept" of the supply and control of water; particularly, as the source of supply within the metropolitan area is not unlimited.

It is desirable to "beef up" the fire protection by having an integrated water system throughout the area.

It is desirable to have control of construction and expense, of utility facilities in the areas of potential growth.

It is desirable to hook up the company's facilities with the city's so as to equalize supply and demand in different areas.

It is desirable because the natural future growth of the city will eventually require all of Citizens' properties. If condemnation takes place piecemeal, there will be repeated severance damages, court costs and legal fees.

That the city may anticipate its growth, may be seen from the following language in *City of Tucson v. Sims*, 39 Ariz. 168, 4 P.2d 673:

> "Before it could furnish its own residents with water, it was necessary that it secure from some source a supply sufficient in quantity for this purpose and that it install a system

> for distributing it. . . . Its distributing system was built to meet the needs of a growing population and was, therefore, at that time capable of carrying water to a greater number of people than lived within its boundaries. . . . The City of Tucson, as a result of placing itself in a position to serve its own users, found itself in ownership and control of a surplus of domestic water which could with little if any additional cost be supplied to those outside its limits and its income thereby increased." Pp. 176-177.

Lastly, we hold that the statute requiring that the public use of the property to be condmened, be "more necessary" than the present public use, is inapplicable to the instant case. This issue was decided in *Desert Waters, Inc. v. Superior Court*, 91 Ariz. 163, 370 P.2d 652, where a water company attempted to prohibit the city of Tucson from proceeding with its condemnation suit. In that case we said:

> Section 12-1112 sets forth prerequisites which must be shown before the power of eminent domain may be exercised under the general eminent domain statutes. Where the exercise of eminent domain powers is authorized under a specific statute which has been complied with, it is not necsssary to comply with the general statute." p. 171.

The stay order previously issued herein is vacated, the judgment of the trial court is affirmed, and the case is remanded to the trial court for the purpose of ascertaining

the damages suffered by Citizens due to the taking of its property.

JACK D. H. HAYS, Chief Justice

CONCURRING:

JAMES DUKE CAMERON, Vice Chief Justice

FRED C. STRUCKMEYER, JR., Justice

LORNA E. LOCKWOOD, Justice

WILLIAM A. HOLOHAN, Justice

IN THE SUPREME COURT
OF THE STATE OF ARIZONA

CITIZENS UTILITIES WATER COMPANY OF ARIZONA, an Arizona corporation, *Petitioner,*	)	
vs.	)	NO. 10726
THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF PIMA; THE HONORABLE JACK G. MARKS, A JUDGE THEREOF; and the CITY OF TUCSON, a municipal corporation, *Respondents.*	)	

ORDER AFFIRMING JUDGMENT AND REMANDING FOR FURTHER PROCEEDINGS

Special Action re: Pima County Sueprior Court Number 110899

Evans, Kitchel & Jenckes
by Lex J. Smith and Earl Carroll,
Attorneys for Petitioner

Herbert E. Williams, City Attorney
by Richard H. Day, Assistant City Attorney
Chandler, Tullar, Udall & Richmond
by Thomas Chandler
Rose S. Silver, Pima County Attorney
Attorneys for Respondents

This cause having been heretofore submitted, and the Court having duly considered same, and being now advised in the premises, files its opinion. It is accordingly ORDERED that the stay order previously issued herein is vacated, the judgment of the trial court is affirmed,

and the case is remanded to the trial court for the purpose of ascertaining the damages suffered by Citizens due to the taking of its property.

DONE IN OPEN COURT this 12th day of May, 1972.

STATE OF ARIZONA SUPREME COURT

I, CLIFFORD H. WARD, Clerk of the Supreme Court of the State of Arizona, hereby certify the above to be a full and true copy of the Order Affirming Judgment and Remanding for Further Proceedings made and entered in the above entitled cause by said Court on the 12th day of May, 1972.

IN WITNESS WHEREOF, I hereunto set my hand and affix the official seal of said Court this 14th day of June, 1972.

CLIFFORD H. WARD, Clerk
By /s/ Mary Ann Hopkins, Deputy Clerk

CC: Evans, Kitchel & Jenckes – Chandler, Tullar, Udall & Richmond – Herbert E. Williams, Esq., City Attorney – Mrs. Rose S. Silver, Pima County Attorney – Hon. Jack G. Marks, Judge

---

ORDER DENYING REHEARING

The following action was taken by the Supreme Court of the State of Arizona on June 13, 1972 in regard to the above entitled cause:

"ORDERED: Motion for Rehearing – DENIED."

Certified copy of Order Affirming Judgment and Remanding for Further Proceedings issued this date.

CLIFFORD H. WARD, Clerk

By /s/ Mary Ann Hopkins,
Deputy Clerk

TO:

Lex J. Smith, Esq., Evans, Kitchel & Jenckes, P.C.,
363 North First Avenue, Phoenix 85003

Thomas Chandler, Esq., Chandler, Tullar, Udall & Richmond,
1110 Transamerica Building, Tucson 85701

Herbert Williams, City Attorney, City Hall, Tucson, Arizona

Rose S. Silver, Pima County Attorney,
131 W. Congress, Tucson 85701

Hon. Jack G. Marks, Judge of Pima County Superior Court,
Courthouse, Tucson 85701

West Publishing Company, 50 Kellogg Blvd., St. Paul,Minnesota
55102.

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

THE CITY OF TUCSON, a municipal corporation, *Plaintiff,*	)	
vs.	)	NO. 110899
CITIZENS UTILITIES WATER COMPANY OF ARIZONA, a corporation, *Defendant.*	)	

MEMORANDUM OPINION AND ORDER

In this action the City of Tucson, hereinafter called the "plaintiff" or "city", seeks to condemn the portion of the properties of the Citizens Utilities Water Company of Arizona, hereinafter called the "defendant" or "utility", situated within and outside of the municipal boundaries of the city. The properties are used by the utility in connection with its business of owning and operating a waterworks

system and selling and distributing water for domestic and commercial purposes in the city and in adjacent or nearby areas within six miles of the city limits.

Although described by the city in the complaint as a "waterworks system", the copy of Plan No. 2243 (Exhibit C annexed to the complaint) filed by the utility on February 21, 1969, in compliance with the court's minute entry order of February 13, 1969, reveals that there are many portions of the defendant's properties lying outside of the city not connected to each other and not connected to any part of the utility's properties lying within the boundaries of the city which are used or may be used in the future to furnish water to persons outside such boundaries.

Before the court is the defendant's motion to dismiss the complaint for failure to state a claim upon three grounds, to wit:

> 1. Resolution No. 7447, which authorizes the filing of the instant action, is void in that Section 2 improperly delegates the power of eminent domain to the City Attorney and attorneys for the city as to all of the remainder or portion of the remainder of the plants, properties and facilities, hereinafter sometimes called the "properties", of the defendant "*** at a future date or dates, [by] an action or actions in condemnation on behalf of the city * * *".
>
> 2. The acquisition by the city of the utility's properties lying outside the city which are used exclusively to supply persons living outside the city and are not necessary in order to provide service within the city is not for a

public use and such properties cannot be acquired by the city through the exercise of the power of eminent domain.

3. The city lacks authorization to condemn the defendant's properties as the acquisition has not been approved by a majority of the qualified electors of the city voting at an election held to determine such assent.

1

There is no merit to defendant's first contention that Resolution No. 7447 is void because this action was authorized by Section 1 (and not by Section 2) of the resolution. In Section 1 the Mayor and Council specified the plants, properties and facilities of the utility to be condemned in Exhibits B, C and D attached to the resolution, which are Exhibits A, B and C attached to the complaint. The validity of Section 2 not being an issue the court holds that Resolution No. 7447 is not void as it pertains to this action.

2

As to the utility's second contention there can be no doubt as to the power of the city to own and operate water distribution systems both within and without the city because the people of the state have granted to municipal corporations authority to engage in industrial pursuits and in any business or enterprise which may be engaged in by virtue of a franchise from a municipal corporation. Constitution, Art. 2, §34; Art. 13, §5; *City of Tucson v. Polar Water Co.*, 1953, 76 Ariz. 126, 259 P.2d 561, on rehearing, 1954, 76 Ariz. 404, 265 P.2d 773; *City of Phoenix v. Wright*, 1938, 52 Ariz. 227, 80 P.2d

390; *City of Tucson v. Sims*, 1931, 39 Ariz. 168, 4 P.2d 673; *City of Tombstone v. Macia*, 1926, 30 Ariz. 218, 245 Pac. 677, 46 A.L.R. 828.

In *City of Phoenix v. Wright, supra*, the Supreme Court, in determining the effect of the aforesaid grants of power by the people, held:

> "It will be seen we have held that regardless, and in the absence, of any statutory authority, by virtue of the constitutional provisions [Art. 2, §34; Art. 13, §5] a municipal corporation may furnish waters from its water system to consumers residing outside of its boundaries. We think the right of plaintiff to furnish water to consumers outside of its corporate limits is no longer open to question." 52 Ariz. 227, 233.

In the earlier case, *City of Tucson v. Sims, supra*, it was held that, even in the absence of specific charter or statutory authority, the city may furnish water to nonresidents for the benefit of the city by way of increasing its income since no provision of its charter of March 7, 1883, or of the then existing state statutes "• • • stood in the way of its doing so, • • •". 39 Ariz. 168, 177. The Supreme Court held, with reference to Art. 13, §5, of the Constitution, that "[n]othing short of an express prohibition or clear implication • • •" could limit or prohibit the city "• • • from doing something advantageous to themselves that is merely incidental to the thing specially authorized. • • •". 39 Ariz. 168, 177. Furthermore, the Supreme Court has held that the addition of Art. 2, §34, to the Constitution by amendment in November, 1912, "• • • enlarged the powers conferred by section 5 of article 13, • • •". *Crandall v. Town of Stafford*, 1936, 47 Ariz. 402, 409, 56 P.2d 660. Thus since November, 1912, Art. 2, §34, of the Constitution "• • • gives municipalities the

right to engage in industrial pursuits, without specifying any limitation whatever as to kind and character.* * *". *Crandall v. Town of Safford, supra,* at 409.

However, Art. 2, §17, of the Constitution is a limitation upon the broad powers granted by Art. 2, §34, and Art. 13, §5, to the extent that the city seeks to acquire private property for such purposes by exercise of the sovereign state's right of eminent domain. *County of Maricopa v. Anderson,* 1957, 81 Ariz. 339, 306 P.2d 268; *In re Forstrom,* 1934, 44 Ariz. 472, 38 P.2d 878.

To be resolved, therefore, is the question – do the statutes and plaintiff's charter authorize the exercise of the power of eminent domain with respect to those plants, properties and facilities of the defendant lying wholely outside of the city's boundaries and not necessary in order to provide service within the city?

Art. IV, §1, of the city's charter enumerates the plaintiff's powers in twenty-nine subsections, six of which are applicable to this action. They read as follows:

"Chapter IV. Powers of City

"Sec. 1. Enumerated.

"The city shall have power:

* * *

"(4) PURCHASE, RECEIPT, ETC., OF PROPERTY. To purchase, receive, have, take, hold, lease, use and enjoy property of every kind and description, both within and without the limits of said city, and control and dispose of the same for the common benefit.

* * *

"(7) ACQUISITION, ESTABLISHMENT, ETC., OF CERTAIN PUBLIC UTILITIES. To acquire by purchase, *condemnation* or otherwise, and to establish, maintain, equip, own and operate works and appliances *within and without the city for supplying the city and its inhabitants, also persons, firms and corporations outside the city*, including other municipal corporations, *with water*, gas, electric light, heat or power, telephone service, telegraphic service, or other works or appliances, for the production or distribution of any public utility within or without the city.

* * *

"(14) SALE AND PURCHASE OF WATER, HEAT, ETC. *To sell, within or without the city, water* and any form of heat or power, and all products of, or service by, any public utility conducted or operated by the city, and to purchase the same.

* * *

"(22) EMINENT DOMAIN. *To exercise the right of eminent domain* for the purpose of acquiring real and personal property of every kind, including *water*, water rights *and waterworks, within or without the corporate limits, necessary or convenient for the use of the said city or its inhabitants.*

* * *

"(24) ACQUISITION OF PROPERTY FOR OTHER PUBLIC UTILITY PURPOSES; DISPOSITION OF PROPERTY ACQUIRED. To acquire by purchase, *condemnation* or otherwise, such lands or other property or rights within or without the city, *as may be necessary or convenient for the establishment, maintenance and operation of any public utility*, or to provide for and effectuate any other public purpose, and to hold, use, improve, operate, control, lease, convey or otherwise dispose of the same for the benefit of the city.

"(25) LEASE OF PUBLIC UTILITIES OWNED BY CITY; LIMITATION ON LEASE OF LANDS; LEASE PROCEDURE; AUTHORITY OF ELECTORS AS TO ACQUISITION AND DISPOSITION OF PUBLIC UTILITIES. To lease to persons, firms or corporations for the purpose of maintenance, operation or use, any public utility owned or controlled by the city, and to provide for the leasing of any lands now or hereafter owned by the city, except lands donated, purchased, or used as public parks or playgrounds; provided, that any such leases shall be made only to the highest bidder therefor by ordinance duly adopted, and provided, further that any and all bids for any such lease may be rejected at the discretion of the legislative body of the city; *provided, that no public utility shall be* purchased, leased, *acquired,*

> sold or in any manner disposed of *without the assent of a majority of the taxpayers, who must be qualified electors of the city, voting on the question at a general or special election at which such question may be submitted.*"
> (Emphasis supplied).

The provisions of the city charter authorizing the city to acquire, own and operate waterworks are equivalent to an act of the Legislature granting power to the plaintiff to engage in the business of furnishing water service to its inhabitants. *City of Tucson v. Polar Water Co., supra; Kaufman v. City of Tucson*, 1967, 6 Ariz. App. 429, 433 P.2d 282. If there be a conflict between any provisions of the city charter and the statutes as to the city's power with respect to the exercise of the power of condemnation, the statutes, being of state-wide concern, prevail and take precedence over the conflicting provisions of the city charter. *City of Tucson v. Polar Water Co.*, on rehearing, *supra*. A municipality, moreover, may only condemn what is actually needed for the public use. *Town of Williams v. Perrin*, 1950, 70 Ariz. 157, 217 P.2d 918.

A careful reading of the charter powers of the city makes it clear that the city has the power to furnish water to persons outside of the city and to acquire the defendant's properties for such purpose. §1 (4), (7), (14), (22) and (24), Ch. IV, City Charter. Furthermore, the power of eminent domain may be exercised by the city in the acquisition of the defendant's properties if the city, acting through its Mayor and Council, has found it is either necessary *or* convenient to acquire the defendant's properties. §1 (22) and (24), Ch. IV, City Charter. With respect to the instant action the Mayor and Council of the city has found that the "* * * acquisition of this water company is necessary and for the best interest of the City of Tucson." Resolution No. 7388, page 1. (Emphasis added).

In addition, the Legislature has implemented the provisions of Article 13, §5, of the Constitution by enactment of Laws of 1921, Ch. 31, §1 (now A.R.S. §§9-511, 512 and 513). A.R.S. §9-511(B) authorizes the city to exercise the right of eminent domain. Thus whether the authority to condemn is found in the city charter or in A.R.S. §9-511(B), or, as contended by the city, A.R.S. §9-516, the court holds that the city may exercise the right of eminent domain, provided the use of the property is a public use.

Counsel have not cited to the court, and the court by independent research has not found, any Arizona decision defining "public use" in the context of Art. 2, §17, of the Constitution, which reads as follows:

> "§17. EMINENT DOMAIN; JUST COMPENSATION FOR PRIVATE PROPERTY TAKEN; PUBLIC USE AS JUDICIAL QUESTION.
>
> "Section 17. Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches, on or across the lands of others for mining, agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having first been made, or paid into court for the owner, and no right of way shall be appropriated to the use of any corporation other than municipal, until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived as in other civil cases in courts of record, in the manner prescribed by law. Whenever an

> attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public."

In Arizona municipalities are authorized to engage in industrial pursuits because the people granted such power to municipalities. Constitution, Art. 2, §34. It is not the result of any legislative assertion that the use of property for such a purpose is a public use. In *City of Tombstone v. Macia, supra,* the Supreme Court considered section 34 of article 2 and section 5 of article 13 of the Constitution and held that, pursuant to Art. 2, §34, of the Constitution, "* * * a municipal ice plant for the sale of ice to the inhabitants of the municipality is a public purpose * * *". 30 Ariz. 218, 229.

This court equates "public purpose" and "public use". Such an equation in a condemnation case is found in *In re Mayor, Etc., of City of New York,* 1892, 135 N.Y. 253, 31 N.E. 1043, 31 Am. St. Rep. 825, in which the Court of Appeals held:

> "* * * Having undertaken the duty imposed upon it by the state to provide such accommodations as the interests of commerce fairly require, all acts by the city, done in the performance of that duty, are for a public purpose. Land which is thus taken is taken for a public use. * * *". 31 N.E. 1043, 1045.

Recent opinions in eminent domain cases in which "public purpose" and "public use" were equated include *Sublett v. City of Tulsa, Okla.,* 1965, 405 P.2d 185; *R & R Welding Supply Company v. City of Des Moines,* 1964,

256 Iowa 973, 129 N.W.2d 666; *Miller v. City of Tacoma*, 1963, 61 Wash.2d 374, 378 P.2d 464; and *Randolph v. Wilmington Housing Authority*, 1958, 37 Del. Ch. 202, 139 A.2d 476.

The conclusion of the court, therefore, is that the defendant's second contention is untenable and that the power of eminent domain may be exercised by the city in this action as to those portions of the defendant's properties lying outside the city which are used exclusively to supply persons living outside the city and are not necessary in order to provide service within the city.

3.

The final contention of the defendant is that the city lacks authorization to condemn the plants, properties and facilities of the defendant as it has failed to allege, as a condition precedent, that there has been an election at which an affirmative vote of a majority of the qualified electors authorized the acquisition of the properties of the defendant, citing A.R.S. §9-514; City Charter, Art. IV, §1(25); and the Municipal Bond Article (A.R.S. §§9-521 to 9-540). On the other hand the plaintiff urges that the complaint is not defective as A.R.S. §9-514 and City Charter, Art. IV, §1 (25), are inapplicable to this action. The plaintiff further contends that no election is required as this action is grounded upon the authority of A.R.S. §§9-516 and 9-518 and, therefore, it is not required to plead that an election has been held. Whether the Legislature created a right of eminent domain by A.R.S. §9-516 independent of the other provisions of A.R.S., Title 9, Ch. 5, Art. 2, (A.R.S. §§9-511 to 9-519) is not the issue now before the court.

The only allegation in the nature of a condition precedent which appears in the complaint is "[t]hat it is necessary under the law to take the property described in Exhibits A, B, and C attached hereto in these proceedings before the City can use said property, and that such taking is hereby instituted according to said law, and, further, the exercising of the right of eminent domain by the City of Tucson and the taking of the above-described property in eminent domain proceedings is authorized by the statute." This allegation does not comply with the provisions of Rule 9(c), Rules of Civil Practice, 16 A.R.S., which reads as follows:

> "9(c) *Conditions precedent.* In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity."

Conditions precedent averred generally or specifically are required and have not been alleged. As such allegations are essential elements of the plaintiff's claim for relief the defendant's motion to dismiss the complaint will be granted with leave to amend the complaint.

ORDER

It is, therefore,

ORDERED that the defendant's motion to dismiss the complaint be, and the same hereby is, granted with leave to the plaintiff to file an amended complaint within twenty (20) days from the date hereof.

DATED this 28th day of February, 1969.

/s/ Jack G. Marks
JUDGE OF THE SUPERIOR COURT

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

THE CITY OF TUCSON, a municipal corporation, *Plaintiff,*	)	
vs.	)	NO. 110899
CITIZENS UTILITIES WATER COMPANY OF ARIZONA, a corporation, *Defendant.*	)	

MEMORANDUM OPINION AND ORDER

Pursuant to stipulation of counsel on November 2, 1971, Phase I of the bifurcated trial of the issues joined by the second amended complaint, as amended, and the answer thereto commenced on November 23, 1971, in order to afford the trial court, sitting without a jury, an opportunity to determine the extent of the properties of the defendant Citizens Utilities Water Company of Arizona, hereinafter sometimes called the "defendant" or "utility", located in Pima County, Arizona, to be condemned.

The plaintiff contends that condemnation of all of the properties of the defendant used by the utility in connection with its business of owning and operating a waterworks system and selling and distributing water for domestic and commercial purposes within the City of Tucson, hereinafter sometimes called the "plaintiff" or "city", and in adjacent or nearby areas in Pima County within 19 miles of the city limits is for a "use [that] is public", as

such words appear in §17 of Article 2 of the Constitution of Arizona and that the plaintiff is not required to demonstrate the necessity for the taking of all of the said properties as seemingly is required by A.R.S. §12-1112(2).

On the other hand, the utility claims that the evidence has disclosed an absence of public use and that the taking of its properties located outside of the city violates A.R.S. §12-1112(2) and (3) as such taking is not "necessary" nor "a more necessary public use" than is its present use by the defendant.

There was no appearance at Phase I of the trial by the defendant James L. Kirk, as County Treasurer of Pima County, Arizona.

The evidence adduced on November 23 and 24, 1971, disclosed that, as of November 23, 1971, there were 2,381 service attachments to the watermains of the defendant located inside the city and 2,817 service attachments to its watermains located outside the city. 26 of the defendant's 30 service areas are located outside the city limits and are not connected with the watermains of the utility located within the city. The defendant has acquired certificates of convenience and necessity to serve water within approximately 64,075 acres in Pima County, of which approximately 50,000 acres are outside the city limits. Whereas the utility is serving water at Corona de Tucson 17 to 19 miles from the city limits (the maximum distance of any of its 30 service areas), the city is supplying water to approximately 8,000 customers outside the city, the furthest being at Diamond Bell Ranch approximately 26 miles from the city limits.

In post-trial memoranda of counsel the court was cited to its memorandum opinion and order filed on February 28, 1969, and, as a result thereof, the court has reviewed the *ratio decidendi* justifying the conclusion that the power of eminent domain may be exercised by the city in this

action as to the portions of the defendant's properties lying outside the city limits which are currently used exclusively to serve persons living outside the city and which are not necessary in order to provide water for domestic and commercial purposes within the city. The evidence adduced during the first phase of the trial has not in any way weakened the conclusion on this point as set forth in the memorandum opinion of February 28, 1969.

The Court has examined all of the cases cited in both post-trial memoranda and noted that the defendant contends that to permit the condemnation of its waterworks properties outside the city limits not connected with its watermains located inside the city is in violation of the due process clause of the 14th Amendment to the Constitution of the United States and §17 of Article 2 of the Constitution of Arizona. However, no cases have been cited to this court in support of this contention.

As far as the Constitution of Arizona is involved, although on page 4 of the memorandum opinion of February 28, 1969, the court quoted from *Crandall v. Town of Safford*, 1936, 47 Ariz. 402, 409, 56 P.2d 660, to the effect that the addition of §34 of Article 2 of the Constitution of Arizona by amendment during November 1912 "* * * enlarged the powers conferred by section 5 of article 13, *supra*," the general rule is that the Constitution of Arizona is not a grant of power but a limitation upon legislative power, *Kilpatrick v. Superior Court*, 1970, 105 Ariz. 413, 466 P.2d 18; *Earhart v. Frohmiller*, 1947, 65 Ariz. 221, 178 P.2d 436; *State ex rel. Davis v. Osborne*, 1912, 14 Ariz. 185, 125 Pac. 884. Therefore, if that amendment enlarged the powers of the city, it did so by prohibiting the legislature from attaching conditions which would decrease the full scope of the constitutional powers granted to the city by §34 of Article 2 and §5 of Article 13 as, in the words of the Arizona Supreme Court, §34

of Article 2 " * * * gives municipalities the right to engage in industrial pursuits, without specifying any limitation whatever as to kind and character. * * *". *Crandall v. Town of Safford, supra,* at page 409. This court holds, consequently, that the legislature could not limit the city by the provisions of A.R.S. §12-1112(2) and (3) as the defendant contends because of the authority granted by the people in §34 of Article 2 and §5 of Article 13 of the Constitution of Arizona, provided, however, the court finds there is a public use for the defendant's properties in accordance with the last sentence of §17 of Article 2 of the Constitution. Thus the court need not determine that the use of the defendant's properties located outside the city limits by the city is a "more necessary public use" or, for that matter, that the taking is "necessary", as contended by the defendant. Cf. *City of Tacoma v. Welker,* 1965, 65 Wash.2d 677, 399 P.2d 330. Furthermore, in *Flecha Caida Water Company v. City of Tucson,* 1967, 4 Ariz. App. 331, 420 P.2d 198, following *Desert Waters, Inc. v. Superior Court,* 1962, 91 Ariz. 163, 370 P.2d 652, the Court of Appeals held that the city, because its condemnation action, as is the instant action, complied with A.R.S. §9-516, " * * * was not required to make the findings mandated by A.R.S. §12-1112." 4 Ariz. App. 331, 333.

The finding by the Mayor and Council of the City that the " * * * acquisition of this water company is necessary and for the best interest of the City of Tucson", Resolution No. 7388, page 1, as supplemented by Resolution Nos. 7447 and 7840, is a finding of public purpose authorizing the condemnation of all of the defendant's properties.

Therefore, the court holds that the power of eminent domain may be exercised by the city in this action as to all of the defendant's properties lying outside the city which are now used exclusively to supply persons living

outside the city and are not necessary at this time to provide water service within the city.

ORDER

It is therefore,

ORDERED that the issue to be tried before the court and jury at Phase II of the bifurcated trial shall be the amount of damages due from the plaintiff The City of Tucson, a municipal corporation, to the defendant Citizens Utilities Water Company of Arizona, a corporation, for the taking of all of the said defendant's waterworks system, plant and business used by it in Pima County, Arizona, in connection with its business of owning and operating a waterworks system and selling water in the City of Tucson and in adjacent and surrounding areas.

DATED this 29th day of November, 1971.

/s/ Jack G. Marks
Judge of the Superior Court

Copy of the foregoing mailed
this 29th day of November, 1971, to:

City Attorney of the City of Tucson
(Attention: Richard H. Day, Assistant City Attorney)
City Hall
Tucson, Arizona 85701

Chandler, Tullar, Udall & Richmond, Esqs.
(Attention: Thomas Chandler, Esq.)
1110 Transamerica Building
Tucson, Arizona 85701

Attorneys for the plaintiff

Evans, Kitchel and Jenckes, Esqs.
(Attention: Earl H. Carroll, Esq.)
363 North First Avenue
Phoenix, Arizona 85003
Attorneys for the defendant Citizens
Utilities Water Company of Arizona

Pima County Attorney
(Attention: John R. Neubauer, Esq.)
131 West Congress Street
Tucson, Arizona 85701

ARIZONA REVISED STATUTES

§9-511. Power to engage in business of public nature; right of eminent domain

A. A municipal corporation may engage in any business or enterprise which may be engaged in by persons by virtue of a franchise from the municipal corporation, and may construct, purchase, acquire, own and maintain within or without its corporate limits any such business or enterprise. A municipal corporation may also purchase, acquire and own real property for sites and rights of way for public utility and public park purposes, and for the location thereon of water works, electric and gas plants, municipal quarantine stations, garbage reduction plants, electric lines for the transmission of electricity, pipe lines for the transportation of oil, gas, water and sewage, and for plants for the manufacture of any material for public improvement purposes or public buildings.

B. The municipality may exercise the right of eminent domain either within or without its corporate limits for the purposes as stated in subsection A of this section, and may establish, lay and operate a plant, electric line or pipe line upon any land or right of way taken thereunder, and

may manufacture material for public improvement purposes and barter or exchange it for other material to be used in public improvements in the municipal corporation, or sell it to other municipal corporations for like purposes, and for any and all such purposes.

ARIZONA CONSTITUTION – ARTICLE II

* * *

§17. Eminent domain; just compensation for private property taken; public use as judicial question

Section 17. Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches, on or across the lands of others for mining, agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having first been made, or paid into court for the owner, and no right of way shall be appropriated to the use of any corporation other than municipal, until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived as in other civil cases in courts of record, in the manner prescribed by law. Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public.

PORTION OF TRIAL TRANSCRIPT

162 what might be recorded in a study session or before the Mayor and Council that you, as City Manager, at times make oral recommendations, communications, to the Mayor and Council?

A. Yes.

Q. That would not be recorded by tape or in minutes or recorded in any fashion?

A. Yes. Those that are more than about two years back in study session, but it would not be recorded, put on tape.

Q. And did you testify that you had made a recommendation to the Mayor and Council that they acquire this property?

A. Yes, I have.

Q. And you were asked what reasons you gave them for that?

A. Yes.

Q. Now, at that point, there was an objection which the Court sustained. Could I make a very brief offer of proof of that?

THE COURT: You may.

MR. CHANDLER: And I'll do it by just stating what I understand the substance of Mr. O'Mara's testimony to be, and if that is the substance.

THE COURT: Very well.

163 MR. CHANDLER:

Q. Mr. O'Mara, did you, in making your recommendations, state to the Mayor and Council, recommend the condemnation on the basis that it would be desirable to have an area concept of control of supply, a metropolitan area of the concept of control of supply?

A. Yes.

Q. Did you make a recommendation on the basis of any area-wide concept as to the distribution of water?

A. Yes.

Q. Did you recommend it or state to them that it was desirable to the fire protection be available to residents in the environs in the City of Tucson?

A. I believe so in this case it is part of our general approach to going outside of the City when we require.

Q. Did you recommend it as desirable for the City to have control of the construction and expense of utility facilities in the metropolitan area, in the area of potential growth?

A. Yes.

Q. Any other items that come to your mind
164 that you called to their attention in recommending the condemnation?

A. The control of water resources in the Tucson area, that is, the area from which we draw our water supply that we could buy only the entire Citizens throughout this valley and by adjusting our own pumping and determine where is the best place, so the supply in any one area is not too depleted, and also in

this particular case, with regard to eventual cost that we felt we would eventually need or have to take all of the company, and also as a part of the cost consideration the severance damage possibility.

Q. Was there any discussion about the encouraging annexation by having the City water in the surrounding area?

A. Yes. Because when the only water company we are seeking to annex, the water system, and seeking to annex, and we can't make any immediate promises or immediate reduction of rates to the – inside City rates upon annexation where we do not own the outside system, we can only indicate to those who might be trying annexation that we could not give them a definite assurance as to the time we would be able to acquire and provide the inside rates.

165 Q. Were there any discussions about the added cost of duplicating facilities or update the facilities when the City finally did expand and take the facility?

A. I don't think that the duplicating, but certain parts of our consideration is the necessity to beef up the system to fire protection standards.

Q. Anything else that you think of right now?

A. I think that generally covers the ground.

MR. CHANDLER: Thank you. That's all the questions we have of Mr. O'Mara, and that of course that we have just concluded is only an offer of proof.

THE COURT: Mr. Carroll, do you have any objection to the offer of proof other than hearsay?

MR. CARROLL: Yes. If it please the Court, it isn't a proper method of establishing a policy, the policy itself cannot be evidence of necessity if there was such a policy. That the time and place and circumstances of all of these conversations haven't been detailed, the persons present, whether there was in fact some recording or statement made, the fact that no evidence as to whether or not the persons who heard that statement were the same persons
166 that were subsequently on the council at the time it took some action.

If it please the Court, it is incompetent and irrelevant to any of the issues in the proceeding.

THE COURT: All right. The offer of proof is rejected.

MR. CHANDLER: Just a word about it. If it is on the basis of hearsay then I wouldn't feel obliged to go back and lay the foundation, if you want a basis as to who was there and what was said.

THE COURT: It's hearsay, and also at a study session which we have no information concerning the various things that Mr. Carroll pointed out, and I think there are a number of objections. I won't go into the rest of them. You take it from there, Mr. Chandler.

MR. CHANDLER:

Q. Mr. O'Mara, the conversations that you are discussing that you had with the Mayor and Council, was it the Mayor and Council who enacted ordinance 7388?

A. It would be various Mayors and Councils. There have been some changes, some single change